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No. 90-550

Supreme Court, U.S.
FILED
OCT 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

THE EAST ASIATIC CO., INC.,
and
THE EAST ASIATIC CO., LTD.,

Petitioners,

v.

RSR CORPORATION, QUEMETCO, INC.,
and
QUEMETCO REALTY, INC.,

Respondents.

On Petition For Writ of Certiorari
To The Washington State Court of Appeals
Division I

RESPONDENTS' BRIEF IN OPPOSITION

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October 12, 1990

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, RSR Corporation, Quemetco, Inc., and Quemetco Realty, Inc. (collectively "RSR")[1] respectively request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the State of Washington Court of Appeals, Division I, entered in this case.

[1] Quemetco, Inc. and Quemetco Realty, Inc. are wholly owned subsidiaries of RSR Corporation. RSR Holding Corporation is the parent of RSR Corporation.

RESTATEMENT OF THE CASE

RSR is in the lead recycling business. After RSR acquired additional plants in 1972, the Federal Trade Commission and RSR became involved in litigation as to the effect of RSR's acquisitions on competition within the recycling industry. Ultimately, RSR and the FTC agreed to the entry of a consent order to end their dispute. The order stipulated that RSR would be divested of its Seattle plant at "no minimum" price, but only if an F.T.C. approved buyer could be found that had the ability and good faith intent to continue to operate the Seattle plant. The consent order relieved RSR of its duty to divest unless a buyer was found within 150 days of the entry of the order that would keep the Seattle plant operating. Only one qualified buyer surfaced. It was petitioner EAC's Oregon subsidiary (RSR's principal competitor in the Northwest) which had recently established a lead recycling plant in Oregon at the cost of $25 million.

Based upon representations authorized by EAC that its subsidiary would continue to operate the Seattle recycling plant, the forced transfer of the RSR plant was consummated. However, the Seattle plant was shut down a few days after the sale.

During a seven-week trial, evidence was presented that from the inception of the negotiations, EAC controlled plans to buy the plant with the secret intent of shutting it down. Internal EAC documents opined that the FTC was powerless to prevent the closing of the plant if the sale was consummated. EAC even had the warning of its subsidiary's legal counsel that "RSR could possibly file a suit for damages caused by fraud or misrepresentation" if the plant was immediately shut down after acquisition. At the close of the liability phase of the trial, the jury found EAC to be liable for its fraudulent inducement of the sale of the recycling plant.

During the damage phase of the trial, RSR presented evidence that its compensatory damages were substantial, up to $40,000,000. A unanimous jury returned a general damage verdict on a typed form provided by the court. That general verdict read as follows:

> WE, THE JURY, find for the plaintiff in the sum of $19,445,000.
>
> s/ Patricia A. Olds 8/20/87
> Foreman 3:45 p.m.

The dollar amount, foreman's signature, date and time were properly completed in ink at blanks provided on the verdict form. On the bottom left side of the verdict form were notations in pencil setting forth certain computations. At no time was any evidence adduced identifying whether the pencilled notations were prepared by a juror, whether the jury panel as a whole was aware of such notations, or what was meant by any portion of the notations. Ultimately, the trial court entered judgment on the verdict in the sum of $19,445,000. It is that judgment which has been the basis of the appeals by EAC.

Please refer to the fold-out Appendix A to this brief for a photographic reproduction in color of the verdict sheet that is the touchstone of EAC's petition.

REASONS WHY THE PETITION SHOULD BE DENIED

No Federal Question Was Ruled Upon by the State Court and No Federal Question Was Preserved

In its Statement Of The Case, petitioner attempts to gloss over its late "discovery" that its constitutional rights may have been denied. The argument was not presented to the trial court. In EAC's opening appeal brief, there was no mention of constitutional rights in its "Assignments of Error" nor in

its listing of "Issues Presented." A single sentence at page 94 of EAC's Appeal Brief asserted "Justice and due process in these circumstances cannot be served except by a new trial." This statement was without citation and did not fairly raise or argue Fourteenth Amendment rights. The claimed denial of a constitutional right was first posed in EAC's Reply Brief in the Appeals Court.

Procedurally, the Washington Appeals Court could have dealt with a manifest error affecting a constitutional right which was not raised in the trial court,[2] but it was not obligated to do so.

> "The prosecutor contends on several grounds that JCrR 2.03(d)(5) is unconstitutional. The issue was not raised in the trial court, it was not argued in appellant's Opening Brief and arose only in appellant's Reply Brief. It comes too late and we will not consider it."

State v. Alton, 89 Wn.2d 737, 739, 575 P.2d 234 (1978).

EAC's idea that it was denied constitutional rights was not even "manifest" to EAC until near the end of the appellate process. The Washington Court applied settled rules of evidence on verdict impeachment and was not obligated to consider late arguments of dubious merit solely because the Constitution was invoked in a reply brief.

Insufficient Factual Basis for Petitioner's Constitutional Argument

This is an evidence case, not a punitive damages case. Washington State law does not allow punitive damages. No evidence was presented in support of punitive damages. In arriving at its general verdict, the jury was not instructed to award punitive damages, and RSR did not present jury argument requesting such damages.

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[2] Washington Court Rules on Appeal 2.5(a). Appendix B.

Issues regarding the legal significance of the pencilled notations were resolved at both the trial and appeals court level by application of settled rules of evidence on the impeachment of jury verdicts.[3]

EAC contends that pencilled notations on the bottom of the verdict form are evidence that the jury as a whole unmistakably awarded punitive damages. From that factual premise, EAC seeks a determination by this Court that the judgment entered on the verdict was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. Because there is no cognizable evidence that the jury awarded punitive damages, there is no factual record to reach EAC's legal arguments.

The sole evidence relied upon by EAC for its factual contention that the jury awarded punitive damages is the pencilled notation on the bottom of the verdict form.[4] Courts have

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[3] The trial judge's analysis appears at page 54(a) and the Appellate Court analysis, appears at page 25(a) of the Petitioner's Appendix.

[4] In its petition, EAC contends that the trial court and counsel for RSR conceded that the use of the word "penalty" in the pencilled notes on the verdict form represented a jury award for punitive damage (Petition, page 3) citing Appendix 65a-86a. In fact, the record is to the contrary. During the exchange between counsel and the court, the trial judge indicated that there was no way to tell whether the author of the pencilled notations equated the term "penalty" with punitive damages or was instead using it in some other context. Page 69a of Petition for Certiorari. RSR's counsel properly noted to the trial court that no one could ascertain the meaning of the notation. Page 75a of Petition for Certiorari.

Further, regardless of the characterization of the comments of the trial court and trial counsel, such unsworn statements or arguments do not constitute cognizable evidence on the issue of whether the jury intended to award damages outside the scope of the instructions given. *See, Gardner v. Malone*, 60 Wn.2nd 836, 376 P.2d 651 (1962); *Lindsey v. Elkins*, 154 Wn.588, 615, 283 P. 447 (1929).

uniformly refused to void an unambiguous general verdict based upon extraneous or ambiguous notations appended to a verdict. *Prudential Ins. Co. v. Faulkner*, 68 F.2d 676 (10th Cir., 1934); *Pennsylvania R. Co. v. Logansport Logan & Trust Co.*, 29 F.2d 1 (7th Cir., 1929); *Anderson v. Penn Hall Co.*, 47 F.Supp. 691 (M.D. Penn., 1942); *Barrow v. Talbott*, 417 N.E.2d 917 (Ind. App., 1981); *Mouton v. Dominique*, 476 So.2d 1095 (La. App., 1985); *Fjerstad v. Sioux Valley Hospital*, 291 N.W.2d 786 (S.D., 1980); *Gustavson v. Obrien*, 87 Wisc.2d 193, 274 N.W.2d 627 (1979); *Rowe v. Safeway Stores, Inc.*, 14 Wn.2d 373, 128 P.2d 293 (1942); *Sunset Oil Co. v. Vertner*, 34 Wn.2d 268, 208 P.2d 906 (1949). The rationales for such rule are numerous, including the inherent unreliability of gratuitous writings placed on a verdict form as evidence of the intent of the jury panel and the speculation which must be entered into in an attempt to decipher them. *Rowe v. Safeway Stores, Inc., supra*; 8 Wigmore, Evidence §§ 2349-2350 (McNaughton Rev. 1961).

Protection against similar impéachment of a jury verdict is provided in Rule 606(b) of the Federal Rules of Evidence[5]. In a federal case, this rule would preclude EAC from presenting either juror testimony or affidavits concerning the juror's mental processes in arriving at the verdict.[6] The notations on the verdict form do not even rise to the evidentiary level of testimony and affidavits that would be incompetent for verdict impeachment under Rule 606. It cannot credibly be argued that East Asiatic was deprived of constitutional rights by the Washington Court's refusal to embrace those pencilled calculations as proof that the jury was guilty of misconduct.

Before it may reach EAC's constitutional argument, the Court must be satisfied that there is a factual basis in the record that is of sufficient quality and clarity to indicate the jury awarded punitive damages. No such cognizable evidence

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[5] Appendix C.

[6] Washington decisional law is in accord. *Smith v. American Mail Line, Ltd.*, 58 Wn.2d 361, 363 P.2d 133 (1961); *Gardner v. Malone*, *Id.* at footnote 4.

exists in this case. The author of the pencilled notations is unidentified; there are no signatures or initials. The notations are in pencil whereas the portions of the verdict form for the decision of the jury as a whole and the foreman's signature are in ink.[7] There is no evidence that tells us whether the pencilled notations were made by a singular member of the jury before or during the deliberations to simply reflect that author's thoughts, or whether they were a recapsulization of the mental processes of the jury panel as a whole.

The present case does not provide the Court with proper factual grounds to enter the constitutional arena. Here, the factual foundation upon which the issue would be debated would include an unambiguous general damages verdict well within the range of substantial evidence of the actual damages sustained by RSR.[8] This would be countered by an ambiguous, extraneous notation by an unidentified individual which may not have even been heard of by the jury as a whole. We submit that such factual foundation is not an acceptable basis to explore an allegation that the jury unlawfully awarded punitive damages.

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[7] As noted by the trial judge at p. 46a of Petition for Certiorari.

[8] The Washington Appeals Court recognized that EAC does not contend that the $19,445,000 was outside the range of substantial evidence of compensatory damages. P. 27a of Petition for Writ of Certiorari.

CONCLUSION

The factual foundation for EAC's constitutional argument is its contention that ambiguous, extraneous pencilled notations on a general damage verdict form establishes that the jury impermissibly awarded punitive damages. Reasoned legal precedent has rejected such notations as a foundation to impeach an otherwise unambigouos general verdict. The Washington State Appellate Court opinion did not address a federal question and was not required to do so. There is no factual record upon which to base a constitutional argument. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 12th day of October, 1990.

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APPENDIX A

FILED
KING COUNTY, WASHINGTON
AUG 20 1987
SUPERIOR COURT CLERK
BY DEBORAH BARRETTE
DEPUTY

87-9-12643-4

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

RSR CORPORATION, et al.,

Plaintiffs,

vs.

BERGSOE METAL CORPORATION; et al.,

Defendants.

NO. 84 2 16023 3

VERDICT FORM

JUDGMENT NUMBER

WE, THE JURY, find for the plaintiff in the sum of 19,445,000.

Patricia A. Olds
FOREMAN

8/20/87
3:45 P.M.

	CAL
	DOCK
	CASH
	CERT
	SUPP
	CRIM
	FILE
	TRANS

$6,227,000
- 1,444,000
+2,166,000
$ 6,949,000
+ 6,496,000
13,445,000
+ 6,496,000
$ 19,945,000
- 500,000
$ 19,445,000

PAST LOSS
+ 3 YRS @ 1987 RATE
+ 3 YRS FUTURE PER YEAR
REAL PROP SALE
TOTAL DAMAGES

357.50

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APPENDIX B

Washington Court Rules on Appeal

Rule 2.5

Circumstances Which May Affect Scope of Review

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

APPENDIX C

Federal Rules of Evidence

Rule 606(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (As amended Pub. L. 94-199, § 1(10), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987).